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In the

Supreme Court of the United States

THE COUNTY OF NASSAU and JOSEPH JABLONSKY,

Petitioners,

vs.

RAY E. SHAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CORRECTION OFFICERS' BENEVOLENT ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF [1]

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, the Correction Officers' Benevolent Association, Inc. ("COBA") hereby moves this Honorable Court for leave to file an *amicus curiae* brief in support of the Petitioners. The brief follows this motion. COBA urges the Court to reverse the decision of the Second Circuit which held that individuals arraigned on misdemeanor charges may not Constitutionally be strip searched prior to admission to a "jail" absent individualized reasonable suspicion that the inmate is in possession of contraband.

COBA has requested leave of the parties' counsel to file an *amicus curiae* brief, but has secured such consent only from counsel for Petitioners.

COBA is the certified bargaining representative for nearly 11,000 men and women Correction Officers who work for one of the largest municipal correctional systems in the nation — the New York City Department of Correction ("NYCDOC"). Responsibility for the safety and security of inmates, visitors, and both uniformed and non-uniformed NYCDOC staff falls largely to the members of COBA. However, under the Second Circuit's analysis in *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001) this legitimate safety interest has been compromised. COBA members are now prohibited from conducting routine strip-searches of new admittees to facilities under the control of the NYCDOC; a correctional system where, regardless of the charge on which they have been arraigned, inmates are inserted into the

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[1] Pursuant to Rule 37.6 of this Court, counsel for *amicus curiae* authored this brief in its entirety. No monetary contribution was made to the preparation of this brief by any person or entity other than *amicus curiae* and its counsel.

general population of nearly 14,000 incarcerated people on Rikers Island.

The fallacious jail/prison distinction made by the Circuit Court fails to take into consideration the qualitative and quantitative differences between small facilities which are termed "jails," and one of the largest American municipal correctional facilities — Rikers Island — which is a "jail" under the Circuit Court's analysis. The Circuit Court's decision impermissibly interferes with legitimate security concerns of correctional authorities, and is a barrier to the safe operation and administration of the NYCDOC by COBA members. The input of COBA would be helpful to the Court in resolving this matter.

Given the dire ramifications of the Circuit Court's decision upon the day-to-day operations of the NYCDOC and the safety of COBA members and their charges, *amicus curiae* respectfully request that this Honorable Court grant it leave to file the attached brief.

QUESTION PRESENTED FOR REVIEW

Like the Nassau County Correctional Center ("NCCC"), the New York City Department of Correction ("NYCDOC"), for which Correction Officers' Benevolent Association ("COBA") members work, has a policy of strip searching all those admitted to the care of the NYCDOC in order to prevent entry of weapons, drugs, and other contraband into the system. However, the Second Circuit applied a heightened "reasonable suspicion" standard first articulated in *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), and declared the NCCC strip search policy in violation of the Fourth Amendment of the United States Constitution. *Shain v. Ellison,* 273 F.3d 56 (2d Cir. 2001).

As set forth in the dissent of Circuit Judge Cabranes, this ruling conflicts with several other Circuits which apply to such searches this Court's more deferential "reasonably related to legitimate penological objectives" standard established one year after *Weber* in *Turner v. Safley*, 482 U.S. 78 (1987). According to the Circuit Court, *Turner's* holding is limited to cases involving "prisons" and does not apply to "jails" such as NCCC or the system operated by the NYCDOC; which, whether termed a "prison" or "jail," is one of the largest municipal correctional institutions in the United States.

The question presented is: Whether this Court's holding in *Turner v. Safley*, 482 U.S. 78 (1987), that a prison regulation is constitutional if it bears a reasonable relation to a legitimate penological objective, applies to any detention facility, whether it is called a jail, a prison or a correctional center?

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INTEREST OF *AMICI*

COBA is the certified bargaining representative for the nearly 11,000 men and women Correction Officers who work for one of the largest municipal correctional systems in the nation — the New York City Department of Correction ("NYCDOC"). Responsibility for the safety and security of inmates, visitors, and both uniformed and non-uniformed NYCDOC staff falls largely to the members of COBA.

The NYCDOC averages a daily inmate population of approximately 14,500[1] — more than the incarcerated population in any of 35 states. On a day to day basis the men and women of COBA transport approximately 1,700 inmates to 15 court detention facilities in the 5 boroughs of New York City. The NYCDOC admits into custody somewhere between 120,000 and 130,000 inmates annually. Of these, nearly 70% are pre-trial detainees — charged with misdemeanors and felonies. In some cases these detainees are residents of Rikers Island[2] due to an inability to meet bail set by a Judge. However, in many more cases, these pre-trial detainees have been placed into the custody of the NYCDOC by a Judge due to the nature of the crime charged, particular criminal history, or other factors.

As with the NCCC, the remainder of inmates are misdemeanants and felons serving terms one year or less, parole violators awaiting parole revocation hearings, state inmates awaiting either transfer to state facilities or resumption of court proceedings, and state "contract" convicts serving their time at Rikers. It must be noted that inmates in the NYCDOC

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[1] Comparatively, the NCCC houses approximately 1,800 inmates daily, and cycles only about 14,000 people through its' system annually. *Shain*, 273 F.3d at 74 (Cabranes, J., dissenting).

[2] This term refers generally to the ten jails housing men and women for the NYCDOC. For more information on the NYCDOC, please see the web site at http://www.nyc.gov/html/overview.html.

system, like inmates at NCCC, are not assigned to housing based upon pending charges, but rather factors such as age, gender, sexual orientation, prior history of behavior within the NYCDOC system, or particular medical needs.

Should the Second Circuit decision stand, COBA members will be unable to keep contraband from entering the NYCDOC system. This will have dire consequences on the safety of inmates and staff.

SUMMARY OF ARGUMENT

In *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001), the Second Circuit departed from this Court's jurisprudence concerning prison regulations. The majority in *Shain* held that visual strip/body cavity searches of misdemeanant pre-trial detainees, absent a "reasonable suspicion" that the person being searched possessed contraband, violates the Fourth Amendment. The Circuit Court applied this standard developed in *Weber v. Dell,* 804 F.2d 796, 802 (2d Cir. 1986) rather than the "reasonably related to penological interests" standard developed by this Court a year later in *Turner v. Safley,* 482 U.S. 78, 89-90 (1987). The *Turner* standard has been applied by numerous Circuit Courts. Indeed, the Second Circuit ignored that it had previously applied the "reasonably related" standard in the context of strip searching a pre-trial detainee who was commingled with sentenced inmates. *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992). By their ruling, the Circuit Court succeeded in "[creating] a Circuit split where there was none — a Circuit split that calls out for resolution by the Supreme Court." *Shain*, 273 F.3d at 70 (Cabranes, J., dissenting).

The Circuit Court justified this choice of standard by mechanically differentiating "jails," such as the NCCC or Rikers Island, from "prisons." As was established by the dissent, there is no basis in this Court's jurisprudence for the "untenable distinction" between "jails" and "prisons" when

dealing with strip searching new admittees to a correctional facility. *Shain*, 273 F.3d at 70 (Cabranes, J., dissenting). For three decades it has been the developing jurisprudence of this Court to avoid unnecessary judicial intrusion into the decisions made by corrections professionals concerning institutional security. However, the "reasonable suspicion" standard utilized by the Circuit Court reverses thirty years of jurisprudence by now holding corrections personnel to the standard which applies to police searches incident to an arrest. In so-doing, the Second Circuit has identified an expectation of privacy in correctional facilities which runs counter to that level previously found appropriate by this Court.

It is therefore of vital importance that the Petition be granted and the decision of the Circuit Court be reversed and remanded for the application of the *Turner* standard.

ARGUMENT

A. Constitutional Standards Applied to Pre-Trial Detainees, Strip Searches, and Prison Regulations

While pre-trial detainees do not forfeit their constitutional rights at the jailhouse door, they simply do not "possess the full range of freedoms of an unincarcerated individual." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). Rather, a detainee's rights must be balanced against "[t]he fact of confinement as well as the legitimate goals and policies of the penal institution." *Id.* This Court has long tempered this balancing test by a principled position of deference to prison officials and avoidance of court involvement in prison administration — especially federal court interference in the running of state institutions. *Procunier v. Martinez*, 416 U.S. 396 (1974). This principle of deference to prison administrators was again reaffirmed by this Court just two terms ago. *Shaw v. Murphy*, 532 U.S. 223 (2001).

Courts have recognized that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," and therefore assessing the reasonableness of a strip search procedure requires a balancing approach rather than the restricted "jail/prison" approach endorsed by the Second Circuit. *Bell*, 441 U.S. at 559. As stated in *Bell*, "each case requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* Positing such balancing is one thing; to apply it correctly in the practical world of corrections is another matter.

In *Turner v. Safley*, this Court established a standard for evaluating the constitutionality of prison regulations which may impinge upon an inmate's First Amendment rights. *Turner*, 482 U.S. at 89-90. That standard assesses whether the regulation is "reasonably related to legitimate penological interests." In 1990, this Court made explicit that the *Turner* standard was not limited to First Amendment challenges to prison regulations, but should be applied in all cases "when a prison regulation impinges on inmates' constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990). Indeed, the *Turner* test has been applied by the Circuit Courts in the context of gainsaying institutional security by strip searching prisoners. *See e.g., Farmer v. Perill*, 288 F.3d 1254 (10th Cir. 2002) (strip search and visual cavity inspection of inmate going from Special Housing Unit to recreation yard); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) (maximum security prisoners searched on entering and leaving unit). This Court explained that the adoption of this standard was to reconcile the somewhat limited rights of the incarcerated "with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." *Turner*, 482 U.S. at 84-85. This significant principle of deference to correctional professionals, such as are represented by COBA, underscores the need to grant the Petition and overturn the Second Circuit's erroneous decision in *Shain*.

B. The Circuit Court Relied Upon an Unsound Distinction Between "Jails" and "Prisons"

In attempting to reconcile the issue of strip searches of pre-trial detainees with precedent in the Circuit, the *Shain* Court constructed its reasoning in applying the higher "reasonable suspicion" standard around a pretended distinction between a "prison" and a "jail." This, notwithstanding that this Court has a developed jurisprudence concerning the "reasonably related" standard. To permit this false dichotomy built around the "jail/prison axis" requires that this Court accept several false assumptions. *Shain*, 273 F.3d at 71 (Cabranes, J., dissenting).

First, this Court must reject its own jurisprudence leading to *Turner*. As was adroitly pointed out by Judge Cabranes' dissent, the evolution of the "reasonably related" test manifested this Court's intention that the same standard should apply to both "jails" and "prisons." *Shain*, 273 F.3d at 73 (Cabranes, J., dissenting). Indeed, the four cases which were the foundation for the standard enunciated in *Turner* dealt with both jail and prison settings. *See, Pell v. Procunier*, 417 U.S. 817 (1974) (concerning a prison); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (addressing issues in a prison and a jail); *Bell v. Wolfish*, 441 U.S. 520 (1979) (regarding a jail); *Block v. Rutherford*, 468 U.S. 576 (1984) (addressing a jail). This Court's own jurisprudence makes clear that the "jail/prison" distinction drawn by the Second Circuit cannot be abided.

Second, the decision in *Shain* runs counter to this Court's jurisprudence dealing with regulations in jails and prisons. Moreover, as was pointed out by the dissent below, the *Turner* test has been applied in many Circuits both in jail settings and to pre-trial detainees. *See e.g., Veney v. T.V. Wyche*, 293 F.3d 726 (4th Cir. 2002) (*Turner* applied to Riverside regional jail in Hopewell, Virginia); *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) *(en banc)*, *cert. denied*, 529 U.S.

1018 (2000) (*Turner* applied to claim brought by county jail inmate); *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998) (acknowledging that separation of male and female inmates in county jail satisfies penological interests); *Reynolds v. Wagner*, 128 F.3d 166 (3rd Cir. 1997) (*Turner* analysis, rather than strict scrutiny, applied to Berks County "prison" which held pre-trial detainees, sentenced inmates and federal contract inmates); *Walker v. Navarro County Jail*, 4 F.3d 410 (6th Cir. 1996), *reh'g denied*, 1997 WL 42523 (6th Cir. Nov. 26, 1996) (pre-trial detainee in jail); *Anderson v. County of Kern*, 75 F.3d 448 (9th Cir. 1995), *cert. denied*, 516 U.S. 916 (1995) (pre-trial detainee and convicts in County Jail); *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), *cert. denied*, 519 U.S. 1006 (1996) (pre-trial detainee in Cook County Jail); *Harris v. Bolin*, 950 F.2d 547 (8th Cir. 1991) (pre-trial detainee in County detention center).

This "semantic" distinction derided by Judge Cabranes in his dissent is all the more difficult to accept given that it rests on static definitions rather than corrections realities. The Circuit Court presumed that the contemporary usage of the terms "prison" and "jail" follows the definitions found in *Black's Law Dictionary*.[3] Rather, the terms are routinely interchanged "by everyone other than students of penology." *Shain*, 273 F.3d at 72 fn. 3 (Cabranes, J., dissenting).

The question is why the *Turner* standard, which has proved so adaptable in the various Circuits, should now pose a

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[3] Admittedly, some theoretical differences can be found between jails and prisons. However, what is in theory is not in reality. The Second Circuit does not cite to any supporting case law or empirical data embracing this distinction. The Court can defend its position only by restricting its reasoning to *Black's* derivative rather than direct definitions of "prison" and "jail." First definition of prison: "a public building or other place for the confinement for persons whether as punishment imposed by the law or otherwise in the course of the administration of justice." *Black's Law Dictionary*, 1194 (7th ed. 1999). First definition of jail: "a gaol; a prison." *Id.* at 834.

problem for the Second Circuit. Indeed, no barrier existed prior to *Shain* when the *Turner* standard was applied by the Second Circuit not only to pre-trial detainees in "prison" contexts, but to "jail" settings as well.

In *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992), the Second Circuit used the *Turner* standard as applied to the rights of a pre-trial detainee who had only been charged of a crime and not convicted. In so doing, the Circuit determined that an arrestee might, under some circumstances, be subjected to a cavity search without individualized (i.e. "reasonable") suspicion. *Id.* at 77-78. Like the dissent below, COBA believes that the Second Circuit failed to distinguish its departure from this standard. Rather, it would seem that the Second Circuit's ruling was unduly influenced by its prior decision in *Weber v. Dell*. *Weber* and its progeny are inapposite because, as the City of New York has pointed out in its *amicus curiae* brief, these cases involved *pre*-arraignment detainees. Brief for City of New York at 14. The strip searches were conducted *prior* to a judicial determination that probable cause warranted further incarceration — very much in contrast with the situations dealing with *post*-arraignment arrestees.

Furthermore, Judge Cabranes prudently notes that subsequent cases affirming *Weber, Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988) and *Wachtler v. Herkimer County*, 35 F.3d 77 (2d Cir. 1994), completely failed to address the *Turner* standard. Hence, this whole line of reasoning may be considered to have been overruled *sub silentio* by this Court's decision in *Turner*. *Shain*, 273 F.3d at 74 fn. 5 (Cabranes, J., dissenting). Moreover, and perhaps more damaging, the Circuit Court glosses over the fact that it *has* approved of *Turner's* application to the balance between a pre-trial detainee's constitutional rights and regulations in a jail setting. *See, United States v. El-Hage*, 213 F.3d 74, 81-82 (2d Cir.), *cert. denied*,

531 U.S. 881 (2000). COBA offers that the arguments advanced by the Circuit Court are completely unconvincing for departing from the *Turner* standard and the "well-settled, non-technical meaning of the word 'prison.'" *Shain*, 273 F.3d at 72 (Cabranes, J., dissenting). Since the Circuit Court has applied *Turner's* "reasonably related" standard to what qualifies as a jail, by its own typology, it should be directed to do so now by this Honorable Court.

The Second Circuit's position fails to recognize that maintaining institutional security is a legitimate penological interest within jails. This position is based upon the fallacious assumption that only persons charged with minor offenses, or who have been convicted of misdemeanors, populate "jails," and those convicted of felonies populate "prisons." The unspoken bias of the Second Circuit is that the latter group has a greater propensity for smuggling contraband or for being violent. This Court rejected the same argument almost three decades ago, and recognized that in many cases pre-trial detainees pose a greater security risk than do convicts. *Bell,* 441 U.S. at 547. Moreover, having different standards for pre- and post-trial inmates would seem to run afoul of this Court's clear statement in *Bell* that prison officials need not distinguish between convicted inmates and pre-trial detainees when developing security practices. *Bell*, 441 U.S. at 546 fn. 28. *See also*, *Dufrin v. Spreen,* 712 F.2d 1084, 1087-1088 (6th Cir. 1983) (pre-trial detainee need not be segregated from prison population).

Like NCCC, it is the policy of the NYCDOC to conduct a strip search with a visual body cavity search when processing all new admissions into the general population at Rikers Island. In the case of the NYCDOC, inmates returning from Court, a hospital or outside medical facility, work release, funeral or other circumstance, are strip searched without a visual body cavity search. The reason for these searches is the sheer number of interactions which new admissions can have

with inmates and others who may seek to have contraband introduced into the NYCDOC system.

From the time an individual is arrested, to the time he is admitted to Rikers Island, there exist numerous opportunities for the pre-trial detainee to co-mingle with other arrestees. These arrestees may be charged or even convicted of minor or serious crimes. After a person is arrested he is placed in a cell at a precinct station house. The detainee is mixed in with a number of other arrestees who are then all together transported to "central booking." Upon arrival at central booking, the detainee is held in police pens, mixed with other arrestees, misdemeanants and felons, while awaiting finger-printing and photographing. The detainee is then transferred to one of fifteen court pens, which are notoriously over-crowded, where he is once again intermingled with dozens of people charged with offenses, minor and serious. During arraignment, the detainee may come in contact with family and friends, and certainly with his lawyer. Once a detainee is remanded or held on bail, he is returned to the same court pens and then transferred into the custody of the NYCDOC. At this point he is given a physical, medical and blood tests, and, finally, a visual (non-cavity intrusive) strip search. The arrestee is yet again mixed with other pre-trial detainees held on misdemeanor and felony charges who are transported to the appropriate jail on Rikers Island. After arriving at Rikers, he is placed in a receiving room according to rudimentary characteristics such as gender, age, and medical needs. It is not until later in the intake process, when housing is determined, that classification centers around an inmate's propensity for danger or crime charged. By this point, the person has potentially come into contact with dozens of inmates for whom he may have smuggled contraband, or to whom such could have been passed. It must be stressed that each time a detainee is transported to court, which occurs 1700 times per day at the NYCDOC, this same commingling process is

repeated. Thus the chances for contraband to be brought into the NYCDOC system are multiplied many fold.

The Second Circuit has held that a strip/body search policy is unconstitutional because there is a "substantial difference between jail and prison populations." *Shain*, 273 F.3d at 56. This perspective disregards the "quality" of inmates typically housed at Rikers Island. For example, pursuant to legislative mandate contract inmates serving felony sentences are housed at the jails for a specified time periods. *See,* N.Y. Correct. Law § 95 (McKinney 2002). State detainees, including convicted felons, are brought to Rikers to adjudicate a current case or to await transfer to the appropriate state facility. Indeed, New York State prisons are often overcrowded and lack room to house convicted felons who are then held in jails. Often, sentencing guidelines, rather than misdemeanor/ felony distinctions, play a significant role in determining jail and prison populations.[4] Also, someone charged with a felony may plea bargain a sentence to be served on Rikers. Crowded court dockets may leave a person who is charged with a violent felony, such as murder in the second-degree, waiting in the jail; a wait that can often take up to two years. Indeed, one case in which *Turner* was applied in the Second Circuit, involved an approximate 30 month incarceration of an Al-Qaeda associate charged with felonies. *El-Hage*, 213 F.3d 74.

Finally, the Second Circuit's typology fails to acknowledge the evolving science of penology. Many states have developed programs and initiatives servicing inmates which

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[4] When the Second Circuit relied on the differences in sentence length for misdemeanants and felons in N.Y. Penal Law Sections 70.00(1) and 70.15 to support its jail/prison distinction, the court need only have looked at section 70.00 (4) to realize this error. Under this section, an individual convicted of felony possession of a loaded weapon can be given a definite sentence and remanded to the local jail facility. *See*, N.Y. Penal Law §§ 70.00(1), (4) and 265.02.

do not easily fall into the jail/prison dichotomy. For example, the Kentucky Class D Felony Program allows certain felons to be housed in county jails and provide community service. In Texas, the jail system houses state felons serving sentences up to two years or less followed by community supervision. Furthermore, twelve states have jails authorized to house persons convicted for one year or more. *See*, Silverman, *Corrections Today: A Comprehensive Overview* 442 (2d ed. 2001). In New York, local correctional facilities often provide substance abuse or mental health counseling treatment to those convicted of misdemeanors or felonies. These institutional innovations have been designed with deference to the intricate needs of a heterogeneous inmate population; deference recognized as important by this Court in *Bell*. The facilities providing such services do not fall neatly along the jail/prison "axis" as evinced by the Second Circuit. *Shain*, 273 F.3d at 71 (Cabranes, J., dissenting).

Given these myriad common scenarios, it is amazing that the Second Circuit hinges the resolution of a constitutional issue on a legal fiction distinguishing "jails" from "prisons." This ignores very real security concerns and the only sure method of securing the safety of inmates and staff alike.

C. Strip/Body Cavity Searches of Pre-Trial Detainees are Constitutional Under *Turner*

1. The *Turner* Factors

In setting out the *Turner* "reasonably related" test established in 1987, this Court articulated four factors for determining whether a regulation or practice is sufficiently reasonable to pass constitutional muster. Where these factors are met, the judiciary should not substitute its judgment for that of corrections professionals. *Turner*, 482 U.S. at 84-89. The first of these four factors is whether a valid, rational connection exists between the restriction and a legitimate penological interest. If this is fulfilled, the inquiry turns to

whether an inmate has alternative means of exercising the purported right; the impact an "accommodation" would have on correction officers, staff, other inmates, and on a facilities' resources; and the existence or absence of a reasonable alternative to the regulation or practice. *Turner*, 482 U.S. at 89-91. A proper examination of the *Turner* factors, as applied to the NCCC policy and procedure as well as that utilized by the NYCDOC, makes clear that both regulations are reasonably related to a legitimate penological interest, and that these policies and procedures are constitutional.

2. Screening for Contraband and Institutional Security are Legitimate Penological Interests

There can be no serious contention that the overarching interests of security and safety implicated with the smuggling of drugs and weapons into jails is anything but a "legitimate penological interest." *See, Mauro v. Arpaio*, 188 F.3d at 1059. This Court has long approved the security interest with searching pre-trial detainees and convicted inmates after contact visits, and in searching cells of the same to retrieve contraband. *See, Bell v. Wolfish*, 441 U.S. 520 (1974) (searches with all post-contact visit); *Block v. Rutherford*, 469 U.S. 576 (1984) (pre-trial detainees and cell searches). Moreover, COBA is ever mindful not only that the safety of Correction Officers and staff are central to prison administration, but that the Constitution imposes a duty to ensure the safety of prisoners. *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984).

As corrections professionals, COBA members know that the reality is "(e)ven those simply placed in a holding cell could pose a danger to themselves, other inmates, and the guards." *Magill v. Lee County*, 990 F.Supp. 1382 (M.D. Ala.), *aff'd.*, 161 F.3d 22 (11th Cir. 1998). In combating this reality, one of the most effective tools available to the correctional professional is the strip search. *Justice v. City of Peachtree City*, 961 F.2d 188, 193 (11th Cir. 1992). This

Court in *Bell* observed that "there is no basis for concluding that pre-trial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." *Bell*, 441 U.S. at 546 fn. 28. Pre-trial detainees are by definition "persons unable to meet bail — often are awaiting trial for serious, violent offenses, and many have prior criminal convictions." *Block*, 468 U.S. at 586. This is particularly true at Rikers, where convicts are serving short terms of incarceration as compared with many pre-trial detainees who face the possibility of lengthy imprisonment if convicted. Certainly, the placement of a pre-trial detainee into the general population of a jail has been recognized by Circuit Courts as an important factor to be considered in deciding to conduct a strip search. *Cottrell v. Kaysville City*, 994 F.2d 730 (10th Cir. 1993); *Fuller v. M.G. Jewelry*, 950 F.2d 1437 (9th Cir. 1991); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 952 (1982). Hence, it cannot be said that an inmate's status as a pre-trial detainee should exempt him from the legitimate security concern of contraband which all jails and prisons face.

3. No Alternative Would Meet the Legitimate Security Interest of Strip Searching New Admittees

Under *Turner*, once it is determined that the interest is legitimate and reasonable, the inquiry turns on whether alternative means of exercising the purported "right" exist; the impact an "accommodation" would have on correction officers, staff, other inmates, and on a facilities' resources; and, the existence or absence of a "reasonable alternative" to the regulation or practice. In the current context, the answer to all three is negative.

Since the "right" in question is that of privacy from visual strip searches — which includes the close examination of clothing once removed — the only option is for the pre-trial detainee to remain fully clothed. As for "accommodation," the only option to searching would be to keep pre-trial detainees from the general population at all points in their incarceration, since there are many times (discussed *supra* at B) when new admittees come into contact with inmates. To develop a separate housing and transportation system to handle misdemeanants who cannot be strip-searched — which is the only alternative that COBA can envision — would be cumbersome, expensive, and still pose the danger that the misdemeanant would independently act to smuggle drugs and weapons. Indeed, practical considerations aside, and the untold impact on resources and safety for all, the courts have rejected such segregated housing. *Mayoral v. Sheehan*, 245 F.3d 934 (7th Cir. 2001) (rejecting pre-trial detainee challenge to failure to screen and segregate gang-affiliated inmates); *Dufrin*, 712 F.2d at 1087-1088 (pre-trial detainee need not be segregated from prison population). Finally, as for "alternate" practices, the fact is that nothing is more effective in both uncovering contraband and serving as a deterrent to smuggling than the visual strip search. *See, Bell*, 441 U.S. at 559 fn. 40 (rejecting alternative of metal detectors as ineffectual).

It is expected that an argument will be advanced that applying *Turner* will be tantamount to putting prison regulations beyond judicial review. This is far from the truth. *See e.g., Bear v. Kautzky*, 2002 WL 31203882 (8th Cir. Oct. 4, 2002) (preliminary injunction granted to prisoners under *Turner*); *Wolf v. Ashcroft*, 297 F.3d 305 (3d Cir. 2002) (misapplication of *Turner*, no rational relationship shown; remanded); *Bazzetta v. McGinniss*, 286 F.3d 311 (6th Cir. 2002), *pet. for cert. filed* (U.S. Jul. 18, 2002)(No. 02-94) (visitation restrictions violated First Amendment associational rights, Eighth Amendment rights, and Fourteenth Amendment due process

rights); *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001) (prison regulation fails *Turner*'s "reasonably related" nexus); *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) (no rational relationship between legitimate interest and regulation); *Harris v. Ostrout*, 65 F.3d 912 (11th Cir. 1995) (striking strip search as "devoid of penological interest and imposed simply to inflict pain"); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990), *cert. denied*, 498 U.S. 951(1990) (less restrictive alternative exists to meet alternative prong of *Turner* test); *Ashker v. California Dept. of Corrections*, 2002 WL 31155116 (N.D. Cal. Sept. 11, 2002) (book policy arbitrary and does not reasonably meet legitimate penological objective); *Clement v. California Dept. of Corrections*, 2002 WL 31050915 (N.D.Ca. Sept. 9, 2002) (no rational connection between penological interest and internet-based document ban policy). Clearly, challenges to overreaching prison policies have been successful under *Turner*. As this Court has determined in a matter dealing with deference granted to prison administrators, "deference does not insulate from review actions taken in bad faith and for no legitimate purpose." *Whitley v. Albers*, 475 U.S. 312 (1986). Individual abuses of any policing function may occur, but the solution is litigation to curb the individual instance in question. Here, the Second Circuit has disabled a time-tested system which reasonably and rationally meets the institutional needs of facilities like the NYCDOC. Such large complex correctional systems require all new admittees to be searched lest contraband be allowed into the system. Hobbling correction officials and making these institutions run less safely and intelligently is not what our Constitution requires. *Shain*, 273 F.3d at 75 (Cabranes, J., dissenting).

D. The Circuit Court's Decision Undermines Security and Misapplies this Court's Precedent

The logical conclusion of applying the intrusive judicial review standard used by the Second Circuit would exempt

all post-arraignment misdemeanor arrestees from being strip searched — which is still the most effective method of detecting the entry of drugs, weapons and other contraband into a correctional institution. This means that "jail" systems like the NYCDOC become less safe for all concerned. As was pointed out by Circuit Judge Cabranes, the "difficulty with the majority's holding is that it interprets the Constitution as requiring large, complex facilities such as the NCCC to be run less intelligently — and less safely— than ought to be the case." *Shain,* 273 F.3d at 75 (Cabranes, J., dissenting).

This point has been driven home in two post-*Shain* District Court decisions which go far beyond what this Court's jurisprudence should permit. In *Dodge v. County of Orange,* 209 F.R.D. 65, 2002 U.S. Dist. Lexis 13374, No. 02 Civ. 769 (S.D.N.Y. July 24, 2002) the practical impact of *Shain* is made clear by granting a preliminary injunction against the rigorous strip search procedure employed by the Orange County Correctional Facility. The procedure struck down in *Dodge* was developed only after reviewing the procedures being used in New York and New Jersey, as well as Second Circuit case law. The policy permitted strip searches under ten particular circumstances. *Id.* at 67.[5] Ultimately, the District Court Judge held that none of the factors which triggered the strip-search procedure amounted to individualized reasonable suspicion, and thus the policy ran afoul of the Fourth Amendment. In the even more recent case also stemming from Orange County, a Federal District Court Judge extended *Shain* to apply to not only those charged with misdemeanors, but felonies as well. *Murcia v. County of Orange,* 2002 WL

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[5] a) committed sentenced inmate/weekenders; b) committed probation/ parole violators; c) weapons or narcotics offenses; d) known gang affiliation; e) prior or current escape charges; f) committed for a felony; g) prior or current contraband charges; h) known history of contraband charges; i) metal detector/BOSS chair activation; j) inmate appears to be under the influence of drugs/alcohol. *Id.* at 65.

31245264 (S.D.N.Y. Oct. 4, 2002)(No. 00 CIV. 1325). These decisions have boot-strapped the impermissible "jail/prison" distinction made in *Shain*, and turn the necessarily deferential *Bell* jurisprudence of this Court on its head.

As is illustrated by these recent decisions, the Circuit Court has conceptually grouped those in the custody of the NCCC or NYCDOC (who have perforce been seen both by a prosecutor and Judge) with those cases where a police officer has erroneously decided that a strip-search incident to an arrest was warranted. *See, Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1271 n. 7 (7th Cir. 1983) (strip or body cavity searches incident to arrest are only constitutional where there is a reasonable belief that arrestee is concealing contraband); *cf. Swain v. Spinney*, 117 F.3d 1, 5 (1st Cir. 1997) (strip and visual body cavity search must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons); *Kaufman v. Rivera*, 173 F.3d 844 (2d Cir. 1999) (arresting officer cannot perform a strip search of an arrestee charged with a misdemeanor offense "unless the [official has] a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.")

Arrestee cases such as *Mary Beth G.* are categorically different than those where someone is about to be introduced into the general population of a potentially large and complex correctional setting. The Circuit Court has essentially undone the thirty years of this Court's jurisprudence since *Bell v. Wolfish* where the privacy expectation of inmates was found to be significantly different than those of people walking freely in civil society — and certainly different than mere arrestees. Holding corrections personnel to such a standard not only runs counter to that level of inmate privacy previously found appropriate by this Court, but also endangers

the inmates who are the intended recipients of the protections afforded by searching new admittees to jail and prison systems.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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